COMPENSATION REVIEW BOARD

CRB No. 12-120

PATRICIA BRASWELL,
Claimant–Petitioner,

v.

GREYHOUND LINES, INC. and SRS-ITT SPECIALTY RISK SERVICES, INC.,
Employer/Carrier–Respondent.

Appeal from a Compensation Order by
The Honorable Karen R. Calmeise
AHD No. 09-519A, OWC No. 603794

Michael J. Kitzman, Esquire for Petitioner
Shawn M. Nolen, Esquire for Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,[1] A*dministrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.[2]

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 4, 2004, Ms. Patricia E. Braswell injured her left ankle at work. She underwent multiple surgeries to address her symptoms.

Ms. Braswell could not return to her usual duties as a bus driver. Consequently, her employer, Greyhound Lines, Inc. ("Greyhound"), provided vocational rehabilitation services.

On December 17, 2009 at a formal hearing, Ms. Braswell requested permanent total disability benefits from January 1, 2008 to the date of the hearing and continuing as well as medical benefits. A Compensation Order issued on January 29, 2010; Ms. Braswell's requests were denied in part. An administrative law judge ("ALJ") concluded "[Ms. Braswell] is disabled from performance of

[1] Judge Russell has been appointed a temporary CRB member pursuant to the Department of Employment Services' Director's Administrative Policy Issuance No. 12-01 (June 20, 2012).

[2] Jurisdiction is conferred upon the CRB pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

her usual work duties and is entitled to ongoing temporary total benefits as well as vocational rehabilitation services. She is not entitled to permanent total disability benefits for the period subsequent to January 1, 2008."[3]

Almost one year later, another formal hearing was held. The claim for relief was exactly the same as the one requested at the 2009 formal hearing. The result, also, was the same as previously; the claim for permanent total disability benefits was denied in a Compensation Order dated February 24, 2011.

Ms. Braswell appealed the February 24, 2011 Compensation Order to the CRB. In a Decision and Remand Order dated May 11, 2011, the CRB remanded the matter for specific issues to be addressed.

On July 5, 2012, the ALJ addressed those issues in a Compensation Order on Remand. Ms. Braswell's claim for relief was denied.

On appeal this time, Ms. Braswell contends there is no evidence there is employment available within her physical restrictions and her other capabilities. Ms. Braswell requests we reverse the Compensation Order on Remand.

In response, Greyhound asserts the July 5, 2012 Compensation Order on Remand is supported by substantial evidence and is in accordance with the law. Greyhound requests the CRB affirm the Compensation Order on Remand.

ISSUE ON APPEAL

1. Did the ALJ properly apply the *Logan* test to Ms. Braswell's request for permanent total disability benefits?

ANALYSIS[4]

In the previous Decision and Remand Order, the CRB stated:

> At the December 2009 formal hearing, Ms. Braswell requested "an award under the [District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("Act")] of permanent total disability benefits from January 1, 2008 to the present and continuing, with interest, along with causally related medical

[3] *Braswell v. Greyhound Lines, Inc.*, AHD No. 09-519, OWC No. 629144 (January 29, 2010), p. 5 ("*Braswell I*").

[4] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

benefits including authorization for medical treatment." *Braswell I*, *supra*, p.2. Her request for permanent total disability benefits was denied.

At the January 2011 formal hearing, Ms. Braswell requested "an award under the Act of permanent total disability benefits from January 1, 2008 to the present and continuing, with interest and causally related medical benefits." *Braswell v. Greyhound Lines, Inc.*, AHD No. 09-519A, OWC No. 603794 (February 24, 2011), p. 2. The requests for relief at both hearings are identical; in other words, at the January 2011 formal hearing, Ms. Braswell was requesting a modification of the January 2010 Compensation Order denying her request for permanent total disability benefits.

It is well established in this jurisdiction that once a Compensation Order has been issued, the right to an evidentiary hearing is triggered only where there has been a threshold showing that there is reason to believe that a change of conditions has occurred. *See*, *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225 (D.C. 1997) ("*Anderson")*(citing *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988). Then, in order to prevail on the merits, the moving party must present sufficient evidence to prove that a change of condition has occurred in regards to "the fact or the degree of disability or the amount of compensation payable pursuant thereto." §36-324 (a)(1) of the Act; *Anderson*, *supra*.

The evidence supports the ALJ's findings that Ms. Braswell had been treating with Dr. David Maine on an as-needed basis since spring 2009; that in 2010, Dr. Maine found Ms. Braswell's condition was "status quo;" and that Ms. Braswell's past medical history had not changed since June 2009. *Braswell II*, *supra*, p.2. The ALJ went so far as to specifically find Ms. Braswell's medical condition has not changed since the prior formal hearing, *Id.* at p.4. Even though the required change is not restricted to medical conditions, in the February 24, 2011 Compensation Order, there is no analysis of the nature and extent issue in the context of *Snipes*. Without such an analysis, we are unable to ascertain whether the *Snipes* requirements have been satisfied in this case, and this matter must be remanded. [Footnote omitted.][5]

Neither party has raised the *Snipes* issue on appeal. Our focus, therefore, is limited to whether the ALJ answered the *Logan* questions posed in the prior Decision and Remand Order:

1. Is Ms. Braswell unable to return to her usual employment? 2. If yes, has Greyhound proven suitable, alternative employment is available to Ms. Braswell? 3. If yes, has Ms. Braswell disproven the legitimacy of Greyhound's evidence of such employment or has she demonstrated diligence but lack of success in obtaining other employment?[6]

[5] *Braswell v. Greyhound Lines, Inc.*, CRB No. 11-023, AHD No. 09-519A, OWC No. 603794 (May 11, 2011), p. 3.

[6] *Id*. at 4.

As to the first question, the ALJ ruled "as found in the January 29, 201 [*sic*] and February 2011 Compensation Order, Claimant is unable to return to her regular work duties as a bus driver."[7] Neither party disagrees with this ruling.

As for the second question:

> Employer has met its evidentiary burden to show available employment through the testimony of Mr. James Allen and the Vocational Rehabilitation reports. Mr. Allen testified that, as of the date of the Formal Hearing, there was work available in the Baltimore/D.C. labor market and that he was working with [Ms. Braswell] on developing her skills and work experience to become competitive with the labor market. (HT 40) Mr. Allen testified that the Claimant is actively engaged in vocational rehabilitation efforts and showing progress in her work skills. (HT 50-51) Employer has demonstrated the availability of suitable alternative employment. Furthermore, Employer continues to be willing to assist Claimant with her job search efforts and she has not suffered any loss of disability benefits.[8]

Based upon this ruling, the ALJ then shifted the burden back to Ms. Braswell to "refute the employer's presentation. . . either by challenging the legitimacy of the employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment. Absent either showing by the claimant, [s]he is entitled only to a finding of partial disability."[9] Although not artfully expressed, it is this burden the ALJ ruled Ms. Braswell had not satisfied:

> I find that Claimant has not met her burden of showing the unavailability of suitable employment. Claimant has worked with Mr. Allen developing her administrative skills and making her work resume more competitive for over two and a half (2 1/2) years, however, for half of that period of time Claimant was uncooperative and did not demonstrate full diligence in her job training. (HT 31 and 42, see also, January 29, 2012 Compensation Order, pg. 5) Furthermore, Claimant had a five year gap in her work history for which she needed to compensate[.] (HT 45)
>
> Claimant's vocational rehabilitation goals and training may indeed be difficult but testimony supports a finding that her efforts to become employable are not impossible. The fact that Claimant did not have the requisite skills to work in administrative positions prior to the work injury does not lead to a conclusion that she cannot learn to work in that capacity. That record shows that the Claimant has progressed with learning keyboarding skills, computer programs, and she has investigated "work from home" programs in which she would earn wages and gain work experience. (HT 35) Claimant's job search may indeed be difficult and time

[7] *Braswell v. Greyhound Lines, Inc.*, AHD No. 09-519A, OWC No. 603794 (July 5, 2012) (*Braswell II*), p. 2.

[8] *Id*. at 3.

[9] *Logan v. DOES*, 805 A.2d 237, 243 (D.C. 2002).

> consuming, however, upon review of the Claimant's testimony that she is interested in volunteer activities and work from home to get additional work experience; I find Claimant is still engaged in the process of job training and skills development which is but one step in the job search process. (HT 34)[10]

In the May 11, 2011 Decision and Remand Order, the ALJ was instructed to make a specific finding as to whether Greyhound had met its burden of demonstrating the availability of suitable, alternative employment. In response to that mandate, the ALJ determined Greyhound had met that burden by showing that work was available in the Baltimore/DC labor market and that the vocational rehabilitation counselor was working with Ms. Braswell to improve her skills and experience thereby making her competitive:

> In the instant proceeding, Employer has met its evidentiary burden to show available employment through the testimony of Mr. James Allen and the Vocational Rehabilitation reports. Mr. Allen testified that, as of the date of the Formal Hearing, there was work available in the Baltimore/D.C. labor market and that he was working with her on developing her skills and work experience to become competitive with the labor market. (HT 40) Mr. Allen testified that the Claimant is actively engaged in vocational rehabilitation efforts and showing progress in her work skills. (HT 50-51) Employer has demonstrated the availability of suitable alternative employment. Furthermore, Employer continues to be willing to assist Claimant with her job search efforts and she has not suffered any loss of disability benefits. [11]

That criterion, however, is not the *Logan/Joyner* standard. The question under *Logan* concerns a claimant as the claimant and the market as the market exists.

It must be understood that "permanent total disability" is a statutory construct, and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals have ascribed to it; as such, the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the effects of that medical condition, and (3) there is no suitable alternative employment available in the relevant labor market.

While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled or not disabled at all, depending upon the level of wage earning capacity that has been recovered.

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[10] *Braswell II* at 2.

[11] *Id*. at 3.

CONCLUSION AND ORDER

The July 5, 2012 Compensation Order on Remand is VACATED, and this matter is REMANDED for further consider of whether Greyhound has demonstrated there exists in the labor market positions that are within Ms. Braswell's current physical and vocational capacity in light of the factors described in *Logan* and *Joyner*.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

November 13 , 2012
DATE